No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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October 27, 1987

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QUESIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit erred when, for reasons of comity and judicial economy, it refused jurisdiction over an appeal, under 28 U.S.C. § 1295(a)(1), from the final decision of a district court in which the district court's jurisdiction was based on a claim expressly arising under the patent laws.

2. Whether the United States Court of Appeals for the Third Circuit erred when it accepted and decided the merits of an appeal from the final decision of a district court in which the district court's jurisdiction expressly was based on the patent laws, when that appeal had been transferred to the Third Circuit from the United States Court of Appeals for the Federal Circuit and the Federal Circuit had made no finding of a want of jurisdiction as required by 28 U.S.C. § 1631.

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IN THE

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No. ———

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Technograph Liquidating Trust ("Technograph") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit (App., *infra*, 24a-25a) is not reported. The decision of the district court (App., *infra*, 9a-19a) is not reported.

The opinion and order of the United States Court of Appeals for the Federal Circuit (App., *infra*, 2a-3a) transferring the appeal below to the Third Circuit is not reported. The order of the Third Circuit (App.,

infra, 8a) denying Technograph's motion to retransfer the appeal to the Federal Circuit also is not reported.

JURISDICTION

The judgment order of the Third Circuit was entered on June 29, 1987. On September 21, 1987, Justice Brennan extended the time for filing this petition to and including October 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Courts Improvement Act of 1982, 28 U.S.C. § 1295(a)(1) provides, in pertinent part:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—(1) of an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on Section 1338 of this title . . . .

The statute governing jurisdiction under the patent laws, 28 U.S.C. § 1338, provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . .

The statute governing transfer between the courts of appeals, 28 U.S.C. § 1631, provides, in pertinent part:

> Whenever . . . an appeal . . . is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred . . . .

STATEMENT

This case was brought as a "civil action for patent infringement." Complaint, ¶ 1 (App., *infra*, 20a-23a). The patent, of which petitioner is the exclusive licensee, covers a lubricating process used in cold-forming metal car parts with pressure. From the outset, the only basis of federal court jurisdiction over this case has been the "Patent Laws of the United States." *Id.*; 28 U.S.C. § 1338.

Petitioner Technograph's patent was held valid, *Devex Corp.* v. *General Motors Corp.* 321 F.2d 234 (7th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964) [1] and respondent was found to have infringed the patent in its production of automobile bumper and non-bumper parts. *Devex Corp.* v. *General Motors Corp.*, 467 F.2d 257 (3rd Cir. 1972), *cert. denied*, 411 U.S. 973 (1973). Technograph was awarded damages of a reasonable royalty for the infringement relating to bumper parts and prejudgment interest on that royalty. *Devex Corp.* v. *General Motors Corp.*, 667 F.2d 347 (3rd Cir. 1981), *aff'd*, 461 U.S. 648 (1983) (affirming award of prejudgment interest).[2] No royalty was awarded on the 1.3 billion non-bumper parts found to be an infringement of petitioner's patent, despite the statutory requirement that no less than a "reasonable royalty" be awarded upon a finding of infringement. 35 U.S.C. § 284; *Devex Corp.*, 667 F.2d 347. The appeal below involves petitioner's effort to seek compensation for the infringement related to those non-bumper parts and additional post-judgment interest.

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[1] The only petitioner in this case is Technograph Liquidating Trust, successor to Technograph, Inc., a North Carolina corporation. The other named parties below no longer have any interest in this litigation.

[2] The amount and method of calculation of post-judgment interest were determined in *Devex Corp.* v. *General Motors Corp.*, 749 F.2d 1020 (3rd Cir. 1984), *cert. denied*, 106 S. Ct. 68 (1985).

On June 27, 1986, the United States District Court for the District of Delaware denied Technograph's motion: (1) to modify the award of post-judgment interest; and (2) to reconsider, in light of intervening decisions of the Federal Circuit, its refusal to award any royalty for the respondent's infringement of Technograph's patent in the production of non-bumper parts. App., *infra*, 19a. Petitioner Technograph appealed that decision to the Federal Circuit, pursuant to 28 U.S.C. § 1295(a)(1).[3] Respondent moved to transfer the appeal to the Third Circuit, under 28 U.S.C. § 1631, and the Federal Circuit granted the motion. App., *infra*, 1a-3a. The Federal Circuit held that the transfer to the Third Circuit best served "[t]he interests of comity and judicial economy." App., *infra*, 3a. The court, however, did not make a finding of lack of jurisdiction as required by statute. 28 U.S.C. § 1631; App., *infra*, 2a-3a. Technograph then moved to transfer the case back to the Federal Circuit because of lack of jurisdiction in the Third Circuit. But that motion was denied, without explanation.[4]

On June 29, 1987, the Third Circuit affirmed, without opinion, the decision of the district court. App., *infra*, 24a-25a.

REASONS FOR GRANTING THE PETITION

This petition raises only the issue of whether the Third Circuit possessed jurisdiction to hear and decide the appeal from the District Court for the District of Delaware when the jurisdiction of the district court

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[3] Section 1295(a)(1) was enacted as part of the Federal Courts Improvement Act of 1982, Pub. L. 97-164, Title I, 127(a), the effective date of which was October 1, 1982.

[4] Technograph filed petitions for writs of certiorari from the Federal Circuit's interlocutory order transferring the case and from the Third Circuit's interlocutory denial of Technograph's motion to retransfer the case to the Federal Circuit. Both of those petitions were denied. 55 U.S.L.W. 3607 (March 9, 1987).

indisputably arose under the patent laws. The jurisdictional issue now finally resolved by the Federal and Third Circuits in this case involves an important and recurring question of federal law, *viz.*, the extent and nature of the appellate jurisdiction of the United States Court of Appeals for the Federal Circuit in patent cases under 28 U.S.C. § 1295(a)(1). In the Federal Courts Improvement Act of 1982, Pub. L. 97-164, Title I, § 127(a), Congress provided in unequivocal language that: "the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of a district court . . . if the jurisdiction of that court was based, in whole or in part, on section 1338." 28 U.S.C. § 1295(a)(1). The Third Circuit has exercised its jurisdiction over this patent appeal in a manner that raises an issue of national importance because the holding below is flatly contrary to the language and intent of the Federal Courts Improvement Act. 28 U.S.C. § 1295(a)(1).

Moreover, the decision below conflicts with the decisions of other courts of appeals that have held that the statute means exactly what it says—that Congress granted the Federal Circuit exclusive jurisdiction over cases arising under the patent laws. See *Kidde, Inc.* v. *E.F. Bavis & Assoc.*, 735 F.2d 1085 (8th Cir. 1984); *Atari, Inc.* v. *JS & A*, 747 F.2d 1422 (Fed. Cir. 1984). It also conflicts with decisions of this Court and other courts of appeals that recognize that considerations of economy and comity do not justify disregard of explicit limitations placed on the jurisdiction of a federal court. See *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978); *Professional Managers' Association* v. *United States*, 761 F.2d 740 (D.C. Cir. 1985) (per curiam). Finally, the decision adds to the jurisdictional confusion resulting from another, and related, split in the circuits between those decisions that hold that the Federal Circuit has exclusive jurisdiction over a case in which the right to recovery turns on a construction of

patent laws, even though the complaint does not allege a patent law violation as basis for recovery,[5] and those cases that hold that the Federal Circuit has no jurisdiction over a case raising patent issues when the complaint does not seek relief directly under patent laws.[6]

I. The Petition Raises An Important Issue of Federal Law Which Has Not Been Decided By This Court

The assignment to the Federal Circuit of *exclusive* jurisdiction over patent cases is designed to ensure greater uniformity in patent law and to avoid forum shopping. See S. Rep. No. 275, 97th Cong., 2d Sess. 5-6, reprinted in 1982 U.S. Code Cong. & Admin. News, 15-16. Indeed, Congress' intent in defining the class of cases to which this exclusive jurisdiction applied was clearly stated at the time the statute was enacted:

> The [Federal Circuit's] appellate jurisdiction in patent cases is defined in relation to the district court's jurisdiction; that is, if the district court has jurisdiction over the case under 28 U.S.C. § 1338(a), on the ground that the case arises under the patent law, the appeal in that case will go to the new appellate court instead of the regional circuit.

H.R. Rep. No. 312, 97th Cong., 1st Sess. 23-24, quoted in *Atari, Inc.* v. *JS & A Group, Inc.*, 747 F.2d 1422, 1433 n.7 (Fed. Cir. 1984) (en banc). In short, Congress intended that its goal of advancing uniformity and avoiding forum shopping would be served best by employing the simple standard of assigning to the Federal Circuit all appeals in cases where jurisdiction in the district court, in whole or in part, "arises under" the patent laws. See *Atari*, 747 F.2d at 1429-1430; *Christianson* v.

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[5] *Christianson* v. *Colt Industries Operating Corportaion*, 798 F.2d 1051 (7th Cir. 1986).

[6] *Christianson* v. *Colt Industries Operating Corporation*, 822 F.2d 1544 (Fed. Cir. 1987), petition for cert. pending, No. 87-499 (filed Sept. 23, 1987).

Colt Industries, 822 F.2d 1544, 1553-1554 (Fed. Cir. 1987). The scope of Section 1295(a)(1) is stated succinctly in *Christianson:* "[i]n sum, what counts is not the mere presence or absence of patent 'issues'; what counts is whether the district court's jurisdiction was based in whole or in part on section 1338." *Christianson*, 822 F.2d at 1553.

Thus, jurisdiction over an appeal of a case arising under the patent laws depends not on any post-hoc characterization of the issues in the case—or on any standards of judicial comity or convenience—but simply on the nature of the case as reflected in the complaint filed in the district court. Congress clearly intended the term "arising under" the patent laws to be understood "in the same sense that cases are said to 'arise under' federal law for purposes of federal question jurisdiction." House Report, at 41; see *Handgards, Inc.* v. *Ethicon, Inc.*, 743 F.2d 1282, 1286 n.3. (9th Cir., 1984). Thus, in determining the Federal Circuit's jurisdiction, the *only* question is whether—under the "well-pleaded complaint rule"—the complaint in the case under appeal may be fairly read to include a claim under the patent laws. See *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) (well pleaded complaint rule); *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908) (same).

Petitioner's claims in the original complaint unquestionably arose under the patent laws. The gist of the complaint was a claim for patent infringement. See Complaint, App., *infra*, 20a-23a. Therefore, jurisdiction over the appeal in this case lies exclusively in the Federal Circuit, and the Third Circuit clearly erred in accepting the Federal Circuit's transfer to it of jurisdiction. In ignoring Congress' express jurisdictional command, and incorporating notions of judicial comity and efficiency into the jurisdictional issue, the Third Circuit and the Federal Circuit have revived the potential for inter-

circuit conflicts in patent law, and the concomitant forum shopping that accompanies such conflicts. These are concerns Congress intended to lay to rest in the Federal Courts Improvement Act of 1982. See S. Rep. No. 275, 97th Cong., 2d Sess. 5-6. It simply does not lie within the prerogative of those courts to be making such decisions based on judicial comity once Congress has made the determinative judgment.

By undermining Congress' clear purpose, the courts of appeals have incorrectly decided an important question of potentially broad impact. *Cf. United States* v. *Hohri*, 107 S.Ct. 2246, 2249 (1987). Indeed, the Seventh Circuit, in considering a similar issue of jurisdiction in patent appeals in *Christianson*, 798 F.2d at 1058 n.10, noted a "burgeoning list of cases delineating, at considerable expense to the parties and the judicial system and no doubt considerable bewilderment to laymen, the boundaries of 28 U.S.C. § 1295(a)(1)." This Court should grant the petition to resolve this jurisdictional issue.

II. The Decision Below Conflicts With Decisions of Other Courts of Appeals

The decision below gives rise to clear conflicts among the courts of appeals. *First*, most courts that have addressed the issue have concluded, correctly, that the Federal Circuit's exclusive jurisdiction only extends to cases "arising under" the patent statute. See, *supra*, pp. 5-7; *Atari*, 747 F.2d at 1429-1430; *Kidde, Inc. v. E.F. Bavis & Associates, Inc.*, 735 F.2d 1085 (8th Cir. 1984). Consistent with this position, other courts have recognized that cases raising patent issues—but not "arising under" the patent laws—are not within the jurisdiction of the Federal Circuit and must be decided by the regional courts of appeals. See *Gilson* v. *Republic of Ireland*, 787 F.2d 655 (D.C. Cir. 1986); *Handgards, Inc.* v. *Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984); *Ballard Medical Products* v. *Wright*, 823 F.2d 527 (Fed. Cir.

1987). These courts of appeals have been faithful to Congress' intent in granting patent jurisdiction to the Federal Circuit in Section 1295.[7]

In contrast, both the Third Circuit and the Federal Circuit in the proceedings below reached precisely the opposite conclusion from the one drawn in the cases described above. In the present case, which indisputably "arises under" the patent laws, the Federal Circuit transferred the appeal to the Third Circuit. See *supra*, 4; Complaint, App. *infra*, 20a-23a. The Third Circuit, which lacked jurisdiction over the appeal in this case, because of the Federal Courts Improvement Act, erroneously refused to re-transfer the case to its proper forum and simply affirmed.

Second, the rationale employed by the courts below to justify disregard of the mandatory jurisdictional limitation in Section 1295 also has been expressly rejected by other courts of appeals. In *Professional Managers' Ass'n* v. *United States*, 761 F.2d 740, 744-745 (D.C. Cir. 1985), the court rejected an argument not to transfer a case to the Federal Circuit because it would be more "efficient" for the D.C. Circuit to resolve the issue that had already been fully briefed. What the courts below ignored and the D.C. Circuit correctly recognized is that jurisdictional statutes such as Section 1295 are the "source of [the courts of appeals] authority to resolve disputes, and they cannot be ignored for reasons of either fairness or efficiency." *Id.* at 745. See *Owen Equipment*, 437 U.S. at 374; *United States* v. *Hohri*, 107 S.Ct. at 2245 (Blackmun, J., concurring). The District

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[7] Congress divided authority between the Federal Circuit and the regional circuits on the basis of patent *cases*—not patent *issues*. Under this division of authority, the regional circuits sometimes decide patent issues, and the Federal Circuit "decides all issues, including nonpatent issues, in a 'case' that is properly within its jurisdiction." *Christianson*, 822 F.2d at 1552 (Fed. Cir. 1987).

of Columbia Circuit, unlike the Third and Federal Circuits in the instant case, has quite properly refused to substitute its view of comity and judicial economy for the mandate of Congress.

Finally, at least one other circuit has interpreted the "arising under" standard for jurisdiction of the Federal Circuit in a fashion that is fundamentally at odds with the approach followed by all other Circuits in analyzing jurisdiction under Section 1295(a)(1). The Seventh Circuit has held that the Federal Circuit must take exclusive jurisdiction over any claim in which the plaintiff is "seeking to vindicate a right or interest that would be defeated by one or sustained by the opposite construction of the patent laws." *Christianson* v. *Colt Industries Operating Corp.*, 798 F.2d 1051 (7th Cir. 1986). Under this reasoning, the Seventh Circuit refused to exercise jurisdiction over a case when the complaint sought no relief directly under the patent laws—the classic example of "arising under" jurisdiction—but raised a substantial issue under the patent laws. The Seventh Circuit transferred the appeal raising the substantial patent issues to the Federal Circuit. The Federal Circuit held that the Seventh Circuit's application of the "arising under" standard was too broad and that the Seventh Circuit erred in transferring the case.[8] Under the legal analyses of Section 1295(a)(1) employed by either the Seventh or the Federal Circuit in *Christianson*, it is clear that the Third Circuit in this case lacked jurisdiction over the appeal from the District of Delaware.

Clearly, if this case had arisen in the Seventh, District of Columbia or Ninth Circuits, it would have been re-transferred to the Federal Circuit. Because the prin-

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[8] Nevertheless, the Federal Circuit, after acknowledging that it did not have jurisdiction, erroneously proceeded to address the merits of the case. *Christianson* v. *Colt Industries Operating Corp.*, 822 F.2d 1544 (Fed. Cir. 1987). A petition for certiorari in that case has now been filed. No. 87-499 (Sept. 23, 1987).

ciple that "[c]ourts created by statute can have no jurisdiction but such as the statute confers," *Sheldon* v. *Sill*, 49 U.S. 411, 449 (1850), is fundamental to the proper functioning of the federal judiciary, the ongoing conflict in the courts of appeals raises a substantial issue of federal law which can no longer be ignored. The rights involved here are simply too important to depend on the fortuity of whether they happen to arise in Delaware or Oregon. This petition presents a suitable vehicle for this Court finally to resolve the issue of the proper division of jurisdiction between the Federal Circuit and the regional courts of appeals. Accordingly, this Court should grant certiorari to resolve the issue.

III. The Court Should Grant This Petition Together With The Petition In *Christianson* v. *Colt Industries Operating Corp.*, No. 87-499

Although the *Christianson* case, No. 87-499 (filed Sept. 23, 1987), and the instant petition do not present identical issues—*Christianson* involves the question of whether a case arose under the patent laws and the instant petition involves a case which unquestionably arose under the patent laws—any decision by this Court in *Christianson* would likely affect the proper disposition of this case. Thus, if the Court were to hold, as petitioner contends, that the Federal Circuit has exclusive jurisdiction over all cases arising under the patent laws, then the Third Circuit's decision below should be vacated, based on the court's lack of jurisdiction, and this case remanded for re-transfer to the Federal Circuit.

Accordingly, the Court should seriously consider granting both petitions and consolidating them for argument. The cases present complementary issues under Section 1295(a)(1) and thus present the Court with an opportunity to clarify more fully the appropriate interpretation of the pivotal federal statute governing jurisdiction of all patent litigation in the courts of appeals. At a minimum, the Court should hold this petition pending the

outcome of the *Christianson* case and then dispose of it as appropriate in light of the decision in that case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 27, 1987

APPENDICES

Appendix A

United States Court of Appeals for the Federal Circuit

DEVEX CORPORATION, ET AL.,
Plaintiff-Appellant,

vs.

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

No. 86-1523

Judgment

ON APPEAL from the UNITED STATES DISTRICT COURT OF DELAWARE **IN CASE NO(S).** CA 3058

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED:

TRANSFERRED PURSUANT TO 28 U.S.C. SECTION 1631 TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Dated August 22, 1986

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART, CLERK

ISSUED AS A MANDATE: September 25, 1986

Appendix B

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

United States Court of Appeals
for the Federal Circuit

DEVEX CORPORATION, et al.,

Appellants,

v.

GENERAL MOTORS CORPORATION,

Appellee.

Appeal No. 86-1523
ON MOTION

Before MARKEY, *Chief Judge*, NEWMAN and BISSELL, *Circuit Judges.*

ORDER

Appellee General Motors Corporation (GM) moves for an order transferring the appeal noticed by appellant Devex Corporation (Devex) to the U.S. Court of Appeals for the Third Circuit. GM argues that the only issue on appeal concerns interest on the postjudgment interest judgment and interest on the cost judgment and is more appropriately heard by the Third Circuit.[1]

Devex opposes the motion to transfer on the ground that, in addition to the interest issue, the appeal concerns a patent damages issue. GM argues that the damages issue

[1] For a history of this litigation, *see Devex Corp. v. General Motors Corp.*, 467 F.2d 257 (3d Cir. 1972), *cert. denied*, 411 U.S. 973 (1973); *Devex Corp. v. General Motors Corp.*, 667 F.2d 347 (3d Cir. 1981), *cert. denied in part*, 456 U.S. 988 (1982), *cert. granted in part, General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983); *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020 (3d Cir. 1984), *cert. denied*, 54 U.S.L.W. 3223 (1985).

is a red herring and that Devex is trying, once again, to reopen a damages issue that was decided by the Third Circuit in its 1981 decision.[2]

On March 20, 1984 this court dismissed cross-appeals in this litigation on postjudgment interest issues because the Third Circuit had asserted jurisdiction. This case began in the Third Circuit, which issued two decisions in the case well before this court was created. In 1984 it issued a third decision in the case. The parties' arguments over the presence or absence of particular "issues" remaining are unpersuasive in this case. *See Atari, Inc. v. JS&A Group, Inc.*, 747 F.2d 1422, 1429 (Fed. Cir. 1984) (*in banc*). The Third Circuit has developed a familiarity with this case extending over some fourteen years. The interests of comity and judicial economy are best served by a transfer to that court. *See USM Corporation v. SPS Technologies, Inc.*, 770 F.2d 1035, 1037 (Fed. Cir. 1985); *Atari, supra.*

Accordingly,

IT IS ORDERED THAT:

The appeal is transferred pursuant to 28 U.S.C. § 1631 to the Court of Appeals for the Third Circuit.

22 Aug 86
Date

FOR THE COURT

/s/ Howard T. Markey
Howard T. Markey
Chief Judge

cc: Sidney Bender, Esq.
Arthur G. Connolly, Jr., Esq.

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[2] Certiorari was denied on this issue by the Supreme Court, 456 U.S. 988 (1982). A "Motion for Leave to File Out-of-Time Petition for Rehearing" on the damages issue was also denied by the Supreme Court, 54 U.S.L.W. 3228 (October 7, 1985).

Appendix C

United States Court of Appeals for the Federal Circuit

DEVEX CORPORATION, ET AL.,D,

Appellant,

vs.

GENERAL MOTORS CORPORATION,

Appellee.

Appeal No. 86-1523

Before MARKEY, *Chief Circuit Judge,* NEWMAN and BISSELL, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

9/18/86

Date

cc: Mr. Sidney Bender
Mr. Arthur G. Connolly, Jr.

Appendix D

United States Court of Appeals for the Federal Circuit

DEVEX CORPORATION, ET AL.,

Appellant,

vs.

GENERAL MOTORS CORPORATION,

Appellee.

Appeal No. 86-1523

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

9/30/86

Date

cc: Mr. Sidney Bender
Mr. Arthur G. Connolly, Jr.

Appendix E

In the United States Court of Appeals for the Third Circuit

DEVEX CORPORATION, TECHNOGRAPH, INC., *et al.*,
Appellant,

v.

GENERAL MOTORS CORPORATION,
Appellee.

No. 86-5771

Appellant's Motion to Transfer Appeal to the Federal Circuit

Appellant Technograph, Inc. filed this appeal in the United States Court of Appeals for the Federal Circuit.[1] The appellee, General Motors, moved that Court to transfer the appeal to this Court pursuant to 28 U.S.C. § 1631, and the Federal Circuit has done so in "[t]he interests of comity and judicial economy." Pursuant to that order (a copy of which is attached hereto as Exhibit "A"),[2] the appeal has now been placed on this Court's docket at No. 86-5771.

Technograph now moves this Court to return the case to the Federal Circuit because it is that Court that has exclusive jurisdiction over this appeal under 28 U.S.C. § 1295(a)(1). As is more fully set forth in the attached memorandum, the question is one of jurisdiction, and not one of "comity and judicial economy." Moreover, it is clear that the Federal

[1] Of the many original plaintiffs below, Technograph is the sole remaining party in interest. *See Devex Corp. v. General Motors Corp.*, 579 F. Supp. 690 (D.Del.), *aff'd*, 746 F.2d 1466 (3d Cir. 1984).

[2] The Federal Circuit has since denied Technograph's motion for rehearing and its suggestion for *en banc* consideration of the transfer order.

Circuit's transfer order is not binding on this Court. *See Christianson v. Colt Industries Operating Corp.*, 798 F.2d 1051 (7th Cir. 1986). Given the want of jurisdiction in this Court, the case must be returned to the Federal Circuit pursuant to 28 U.S.C. § 1631.

Because this motion is submitted on the question of jurisdiction only, and is not addressed to the merits of the appeal, appellant respectfully requests that it be considered prior to briefing and argument on the merits of the case. Appellant also requests an opportunity to be heard on the matter if the Court concludes that argument would be helpful to it, consistent with Third Circuit Rule 11(1).

Respectfully submitted,

Dated: November 13, 1986

/s/ *Alfred W. Putnam, Jr.,*

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Attorneys for Plaintiff-Appellant

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5771 November 28, 1986
DEVEX CORP., et al.

vs.

GENERAL MOTORS CORP.
Devex Copr., et al., Appellants
(DE D.C. Civil No. 3058)

Present: GIBBONS, STAPLETON and MANSMANN,
Circuit Judges.

1. Appellants' motion to transfer appeal to the U.S. Court of Appeals for the Federal Circuit,
2. Appellee's memorandum opposing motion to transfer appeal to the Federal Circuit,
3. Appellants' reply memorandum in support of motion to transfer, (Due 11-24-86, received on 11-28-86, not filed unless Court directs)

in the above-entitled case.

Respectfully,

/s/ Marta Sanchez
Deputy Clerk
597-3080

The foregoing motion is/~~are~~ *denied.*

By the Court.

/s/ John J. Gibbons
Judge

Dated: December 11, 1986

dt/cc: AWP, Jr.
SB
AGC

Appendix G

IN THE UNITED STATES COURT DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DEVEX CORPORATION, et al.,
Plaintiffs,
v. Civil Action 3058 CMW

GENERAL MOTORS CORPORATION,
Defendant.

CONSOLIDATED

FREDERICK B. ZIESENHEIM, et al.,
Plaintiffs,
v. Civil Action 83-567 CMW

TECHNOGRAPH, INC.,
Defendant.

Robert K. Payson, Esquire of Potter, Anderson & Corroon, Wilmington, Delaware.
OF COUNSEL: Sidney Bender, Esquire, Aaron Lewittes, Esquire and Janine L. Bender, Esquire of Leventritt, Lewittes & Bender, Garden City, New York
Attorneys for Defendant, Technograph, Inc., in Civil Action 83-567.

Arthur G. Connolly, Esquire and Arthur G. Connolly, Jr., Esquire of Connolly, Bove, Lodge & Hutz, Wilmington, Delaware.
OF COUNSEL: William A. Schuetz, Esquire of Detroit, Michigan; George E. Frost, Esquire of Barnes, Kisselle, Raisch, Choate, Whittemore & Hulbert, Birmingham, Michigan.
Attorneys for Defendant, General Motors Corporation in Civil Action 3058.

OPINION

Wilmington, Delaware
June 27, 1986

Appendix G

WRIGHT, Senior Judge:

This patent litigation has been before this Court for more than twenty years, has generated numerous opinions and appeals, and threatens to outlast all human participants. Currently pending is the motion of plaintiff Technograph, Inc., for a reasonable royalty and prejudgment interest in relation to previously determined infringement for non-bumper parts, and for additional interest on an award of postjudgment interest previously granted by this Court.

The Court will not set out the protracted history of this dispute because it has been reported extensively, *see, e.g.*, 494 F.Supp. 1369 (D.Del. 1980); 569 F.Supp. 1354 (D.Del. 1983), *aff'd* 749 F.2d 1020 (3d Cir. 1984), and because the current motion focuses on two limited issues. The Court instead will relate separately the relevant background on each prong of plaintiff's motion.

I. REASONABLE ROYALTY AWARD

The patent at issue here involved a process for cold-forming steel products, which defendant General Motors Corp. ("G.M.") used to produce both bumper and non-bumper parts. Following a finding of infringement, *see* 467 F.2d 257 (3d Cir. 1972), an accounting of damages was conducted before a Special Master. The Master awarded substantial damages for bumper part infringement, but concluded that the proof was too speculative to allow an award of damages for non-bumper part infringement. This Court approved the Master's Findings and Conclusions on non-bumper damages, *see* 494 F.Supp. 1369, 1377-78 (D.Del. 1980).

The Third Circuit affirmed the decision not to award damages for non-bumper parts, finding that plaintiff had failed to provide credible evidence from which a reasonable royalty for infringement could be calculated. 667 F.2d 347,

362 (3d Cir. 1981). Plaintiff filed a petition for certiorari with the U.S. Supreme Court, arguing that the failure to award damages after a finding of infringement in the production of non-bumper parts violated the mandate of 35 U.S.C. § 284.[1] The Supreme Court denied *cert.*, *see* 456 U.S. 990 (1982). The Court did consider G.M.'s petition on the issue of prejudgment interest on the damages award for bumper-part infringement and affirmed the award. 461 U.S. 648 (1983).

After this Court's rulings on postjudgment interest and interests on costs were affirmed by the Third Circuit, *see* 749 F.2d 1020 (1984), plaintiff filed a petition for certiorari on the postjudgment interest issue which also raised the issue of a damages award for non-bumper parts infringement. The basis for this petition was the alleged conflict between the Third Circuit's 1981 ruling in this case and decisions of the Federal Circuit rendered in 1983. *See* 53 U.S.L.W. 3839 (U.S. May 13, 1985) (No. 84-1795). The Supreme Court again denied the petition. *See* 54 U.S.L.W. 3223 (U.S. Oct. 7, 1985).

Plaintiff's argument here appears similar to that made to the Supreme Court in the second *cert.* petition: namely, that a conflict exists between the 1981 Third Circuit decision refusing to grant a royalty award for non-bumper part infringement and later decisions of the Federal Circuit.[2] Plaintiff argues that this Court still retains juris-

[1] This section states: "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, . . . "

[2] Those cases are *Stickle v. Heublein, Inc.*, 716 F.2d 1550 (Fed.Cir. 1983); *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075 (Fed.Cir. 1983); and *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506 (Fed.Cir. 1984); *see also, Armco, Inc. v. Republic Steel Corp.*, 707 F.2d 886 (6th Cir. 1983). Plaintiff

(*footnote continued on following page*)

diction over this case and this issue, despite the previous appeals, and that the Court has the power under the law of the case doctrine to recognize the supervening change of law and "correct" the Third Circuit's mistake.

For the sake of argument, the Court will assume that the first two steps of plaintiff's reasoning are correct: the 1981 Third Circuit decision conflicts with later appellate decisions, and this Court retains jurisdiction to reopen the question of a royalty award for infringement in the production of non-bumper parts.[3] Nevertheless, the Court cannot grant plaintiff's request and act on the supervening change of law under the law of the case doctrine.

As a general matter, a court can reconsider a previous ruling when a supervening decision has changed the applicable rule of law. *See, e.g., Zichy v. City of Philadelphia*, 590 F.2d 503, 508 (3d Cir. 1979); *Al Haddad Bros.*

(*footnote continued from preceding page*)

interprets those cases as requiring a court always to award at least a reasonable royalty and prohibiting the denial of any award where the court finds infringement of a valid patent.

[3] The Court has serious doubts about both of these assumptions. Regarding the alleged conflict between the Third Circuit and Federal Circuit decisions, this Court notes the Federal Circuit's recent statement on proof of damages: "One who fails to submit evidence in support of a position cannot be heard on appeal to complain that the trial court failed to find facts upholding that position." *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1519 (Fed.Cir. 1984). In addition, plaintiff's reliance on G.M.'s supposed concession in its latest Supreme Court brief that "*Stickle* is now controlling" is simply beside the point. Plaintiff has taken this statement out of context.

Regarding the Court's continuing jurisdiction over this issue, it appears that a matter which has been decided by the district court, affirmed by the Court of Appeals, and denied certiorari by the Supreme Court generally is no longer *sub judice* in the district court. *See Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, §37 (3d Cir. 1982) (motion under Fed.R.Civ.P. 60(b)(6)); *Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979) (same).

Enterprises, Inc. v. M/S Agapi, No. 82-92, slip op. at 5 (D.Del. May 8, 1986). However, a trial court's power to reconsider a question is very limited after the appeals court has issued a mandate on the question and the matter is again before the trial court on remand or other subsequent proceedings. The proper course for plaintiff to follow if it believes that subsequent decisions have cast doubt on the correctness of the Third Circuit's 1981 ruling on non-bumper parts is to apply to the Third Circuit for a modification or recall of its mandate. *See Riley v. MEBA Pension Trust*, 586 F.2d 968, 972 (2d Cir. 1978); *Elias v. Ford Motor Co.*, 734 F.2d 463, 465-66 (1st Cir. 1984); IB J.Moore, Moore's Federal Practice ¶ 404[10], at 171-172 (2d ed. 1984). This Court's acceptance of plaintiff's invitation to "reverse" the Third Circuit surely would invite a later reversal from that court.[4]

In addition to its "law of the case argument", Technograph claims that its motion on the non-bumper parts issue is proper under Fed.R.Civ.P. 60(b)(6). This provision allows a court to relieve a party from a final judgment or order for "any other reason justifying relief from the operation of the judgment." In *Seese v. Volkwagenwerk, A.G.*, 679 F.2d 336 (3d Cir. 1982), the district court had denied a rule 60(b)(6) motion seeking relief from the Third

[4] In *Morrow v. Dillard*, 580 F.2d 1284, 1297 (5th Cir. 1978), the circuit court found that the district court properly reconsidered its grant of attorneys' fees on remand because of an intervening Supreme Court decision on the question. *Morrow* is distinguishable for two reasons. The original Fifth Circuit decision in *Morrow* did not directly address the attorneys' fee issue, whereas the Third Circuit did address directly the non-bumper parts royalty issue. Second, the intervening decision in *Morrow* came from the Supreme Court and directly conflicted with prior law. In contrast, here the intervening decisions came from a court coordinate to the Third Circuit and may not conflict with the Third Circuit decision, *see supra* note 3.

Circuit mandate in thie case because of a subsequent holding by the Fourth Circuit in direct opposition to the Third Circuit's original decision. The Third Circuit had denied rehearing after the Fourth Circuit decision, and the Supreme Court denied certiorari. The Third Circuit affirmed denial of the Rule 60(b)(6) motion: "The district court is without jurisdiction to alter the mandate of this Court on the basis of matters included or includable in defendant's prior appeal." *Id.* at 337.

Technograph seeks to distinguish *Seese* on the ground that the supervening Federal Circuit decisions, *see supra* note 2, were not "matters included or includable" in its prior appeal because they were rendered after the Third Circuit decision on the non-bumper parts issue. The Court rejects this argument and finds *Seese* controlling. Although the 1983 Federal Circuit decisions could not have been brought up to the Third Circuit in 1981, they were included in one of plaintiff's prior appeals—the 1985 certiorari petition on which the Supreme Court denied review.[5] Plaintiff's invocation of Rule 60(b)(6) to seek review of the Third Circuit's "error" is improper. *See Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979) (rule 60(b)(6) motion cannot be used as substitute for appeal).

In addition, plaintiff admits that determination of the motion is a matter of the court's discretion. The Court will exercise that discretion and deny the motion. Plaintiff has had an abundance of opportunities to make its case for a royalty award on non-bumper parts—before the Special Master, this Court, the Third Circuit, the Supreme Court in 1982 and the Supreme Court in 1985—and the issue consistently has been determined against it. This

[5] *Standard Oil Co. v. United States*, 429 U.S. 17 (1976) (per curiam) is distinguishable for the same reason. *See Seese*, 679 F.2d at 337 n.1.

Court will reconsider the matter only if directed to do so by a higher court.

II. Additional Postjudgment Interest

On August 22, 1983, this Court issued an opinion requiring G.M. to pay postjudgment interest on the damage award at the rate of sixteen percent per annum, 569 F.Supp. 1354. On August 30, 1983, G.M. paid into court $7,170,344.39, representing the full amount of postjudgment interest, at sixteen percent, to that date. On September 9, 1983, this Court entered an Order awarding postjudgment interest at sixteen percent against G.M. in the amount of $7,170,344.39, of which $2,688,879.15 was transferred immediately to Technograph. Docket No. 724.[6] The $2.6 million represented interest at six percent per annum, which G.M. admitted it owed; the remaining $4,481,465.24 represented interest at ten percent per annum (the difference between six and sixteen percent), which G.M. disputed it owed to Technograph. The Court did not permit distribution of the $4.4 million at that time to prevent its possible dissipation by Technograph before final appellate determination of the appropriate rate of interest (six percent vs. sixteen percent). *See* Transcript of September 7, 1983, Hearing ("Transcript"), at 2, 12, 13, Docket No. 725.

On December 1, 1983, this Court ordered G.M. to pay $71,262.43 to Technograph as sixteen percent interest on the allowed costs, 577 F.Supp. 429. That amount also was deposited in Court but not released to plaintiff, *see* Docket No. 762, because G.M. claimed that no interest should be awarded on costs. The $4.4 million in postjudgment interest and $71,262.43 in interest on costs ("the funds")

[6] Approximately $484,000 of the $2.6 million also was withheld by the Court because its ownership was disputed among the plaintiffs. Technograph later received this money with accrued interest. *See* Docket No. 773.

were deposited in an account in the name of the "Clerk of the Court of the U.S. District Court for the District of Delaware, C.A. No. 3058", to be invested in insured money market accounts or U.S. Treasury bills, at the direction of plaintiff. *See* Docket No. 717. The funds accrued interest at the market rate, which was less than sixteen percent.

The Third Circuit on November 28, 1984, affirmed this Court's award of sixteen percent postjudgment interest and award of interest on costs, 749 F.2d 1020, 1026-27. This Court approved a stipulation on November 15, 1985, allowing distribution of the $4.4 million and $71,262.43 (plus accrued interest) to Technograph.

Technograph now seeks to recover additional money from G.M. representing the difference between the market-rate interest earned on the funds and the sixteen percent rate of interest awarded by the Court in its September 9, 1983, and December 1, 1983, Orders. Technograph claims that those orders created liquidated amounts equivalent to a judgment, which went unpaid because it did not have complete access to the funds. Postjudgment interest at sixteen percent therefore accrued on the funds until Technograph finally received them November 15, 1985. In addition, Technograph argues that the November 15, 1985, payment must be applied first to accrued interest and then to principal under the "United States" rule, so that a portion of the principal (approximately $660,000) remains unpaid and still is accruing interest at sixteen percent.

Resolution of this matter turns on how G.M.'s payment of the funds into Court is construed. G.M. argues that its payments were made, in effect, under Fed.R.Civ.P. 67, so that its obligation to pay additional interest was dis-

charged.[7] Plaintiff claims that G.M.'s payment was intended as a supersedeas bond under Fed.R.Civ.P. 62(d).[8] No motion under either rule was filed, and this Court's Orders of September 9, 1983, and December 16, 1983, do not specify why the funds were not paid directly to plaintiff. At the September 1983 hearing on the payment, G.M. withdrew its request that the judgment on postjudgment interest be marked satisfied in response to plaintiff's opposition. Transcript at 24.

G.M.'s payments into court served as actual payment of the postjudgment interest judgment, rather than as a supersedeas bond for a stay pending appeal. G.M. paid the funds (representing all postjudgment interest and interest on costs owed) into court, and this Court accepted them, with the understanding that the payments extinguished G.M.'s obligation to pay postjudgment interest and interest on costs. This Court determined that G.M. was liable to the plaintiff, required that payment be made, and ordered that the funds be deposited in a bank account set up in the name of the Clerk of the Court. G.M. had no control over the funds once they were paid into court. Technograph controlled how the funds were invested, and the Court controlled distributions from the account. *See* Docket No.

---

[7] Rule 67 provides:

> In an action in which any part of the relief sought is a judgment for a sum of money . . . , a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing . . . . The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

[8] That provision states: "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay . . . . The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be."

717. G.M. owes no additional postjudgment interest or interest on costs. *Cf. International Telemeter Corp. v. Hamlin Int'l Corp.*, 754 F.2d 1492, 1495 (9th Cir. 1985) (postjudgment interest at statutory rate owed on funds in escrow account established by agreement of parties, over which debtor retained investment control); *Reliable Marine Boiler Repair, Inc. v. Mastan Co.*, 325 F.Supp. 58, 64 (S.D.N.Y. 1971) (plaintiff not entitled to interest on funds in possession of court).[9]

For the foregoing reasons, the Court denies plaintiff's Motion for an Award of Interest and for a Reasonable Royalty Award on Non-Bumper Parts. An Order will enter in conformity with this Opinion.

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[9] The actions of G.M. also suggest that it did not intend the $4.4 million payment to serve as as supersedeas bond. It paid the money before it filed an appeal and even before it was ordered to pay. Rule 62(d) requires that the bond be given "at or after" the time of filing the notice of appeal. G.M.'s counsel also stated that its payment provided plaintiffs with "much more protection than they would have by a supersedeas bond . . . . " Transcript at 2, indicating that the payment was intended as something other than a supersedeas bond. This Court would not have required G.M. to provide a supersedeas bond because of the company's vast assets.

United States v. Los Angeles Soap Co., 153 F.2d 320 (9th Cir. 1946), on which plaintiff relies, is distinguishable. The monies paid into court there were designated by the court as "security" for the disputed tax liability, 153 F.2d at 321. This Court did not designate G.M.'s payments as security for anything, nor intend them to serve as such.

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DEVEX CORPORATION, et al.,
Plaintiffs,
v. Civil Action 3058 CMW

GENERAL MOTORS CORPORATION,
Defendant.

CONSOLIDATED

FREDERICK B. ZIESENHEIM, et al.,
Plaintiffs,
v. Civil Action 83-567 CMW

TECHNOGRAPH, INC.,
Defendant.

ORDER

This 27th day of June 1986, for the reasons stated in the accompanying Opinion,

IT IS HEREBY ORDERED that Technograph's Motion for Award of Interest and for Reconsideration of Judgment with respect to Non-Bumper Parts is denied.

/s/ Caleb M. Wright

UNITED STATES DISTRICT CT. JUDGE

Appendix I

IN THE UNITED STATES COURT,

For the Northern District of Illinois

Civil Action No.....

Devex Corporation, a Corporation of Ohio; William C. McCoy, 524 Bulkley Building, Cleveland 15, Ohio; and Theodore A. TeGrotenhuis, 524 Bulkley Building, Cleveland 15, Ohio.

Plaintiffs,

vs.

General Motors Corporation, a Corporation of Delaware; and Metal Lubricants Co., a Corporation of Illinois,

Defendants.

56 C 1912
(For Infringement of United States Patent
Letters Patent Reissue No. 24,017).

COMPLAINT

The Plaintiffs, complaining of the Defendants, allege:

I.

This is a civil action for patent infringement. The jurisdiction of the Court in this action arises under the Patent Laws of the United States.

II.

Plaintiff Devex Corporation is an Ohio Corporation, with its principal office at 1296 Hall Avenue, Lakewood 7, Ohio; Plaintiffs William C. McCoy and Theodore A. TeGrotenhuis are citizens of the State of Ohio, with offices at 524 Bulkley Building, Cleveland 15, County of Cuyahoga and State of Ohio.

Appendix I

III.

The Defendant General Motors Corporation is a corporation organized and existing under the laws of the State of Delaware, and it is domesticated in Illinois and qualified as a foreign corporation to do business in the State of Illinois. This Defendant has several regular and established places of business in Illinois, including regular and established places of business in the City of Chicago and within the Northern District of the State of Illinois; and this Defendant has committed acts of infringement herein complained of in the Northern District of Illinois as well as elsewhere in the United States.

IV.

The Defendant Metal Lubricants Co. is a corporation organized and existing under the laws of the State of Illinois, and it has a regular and established place of business at 3211 South Wood Street, Chicago 8, Illinois. This Defendant has committed acts of infringement herein complained of in the Northern District of Illinois.

V.

On March 4, 1952, United States Letters Patent No. 2,588,234 were duly and lawfully issued to John A. Henricks of Lakewood, Ohio for an invention in a method of coating and drawing metal. On June 7, 1955, Letters Patent Reissue No. 24,017 were duly and lawfully issued to John A. Henricks for the same invention.

VI.

By an assignment effective as of February 1, 1949, and dated August 22, 1955, the inventor of Letters Patent Reissue No. 24,017, John A. Henricks, assigned said patent to Plaintiff Devex Corporation. By an assignment dated September 10, 1955, Plaintiff Devex Corporation assigned said patent to Plaintiffs William C. McCoy and Theodore A. TeGrotenhuis. Plaintiff Devex Corporation,

however, retained certain reversionary rights therein which it now has.

VII.

Except for certain rights retained by Plaintiff Devex Corporation, Plaintiffs William C. McCoy and Theodore A. TeGrotenhuis are the owners of Letters Patent Reissue No. 24,017.

VIII.

The Defendant, General Motors Corporation, has infringed and is continuing to infringe the Letters Patent Reissue No. 24,017 by drawing and deforming metal according to the process described and claimed therein. Defendant General Motors Corporation has been fully informed with regards to said patent and its infringement thereof, but has nevertheless continued to infringe the same.

IX.

The Defendant, Metals Lubricants Co., has promoted the infringement of Letters Patent Reissue No. 24,017 by Defendant General Motors Corporation by agreeing to hold Defendant General Motors Corporation harmless from any patent liability that may be involved in its use of the process claimed and described in said patent. Defendant Metal Lubricants Co. has been informed with regards to said patent.

X.

By reason of the infringement of the Defendants, Plaintiffs have been seriously damaged and injured.

Wherefore, Plaintiffs pray:

(a) For an accounting to establish their damages against each Defendant; that the damages so found be trebled; and

for judgment against the Defendants according to their respective liabilities;

(b) For reasonable attorneys' fees unjustifiably caused them;

(c) For an assessment of costs against each of the Defendants; and

(d) For such other and further relief as may be required and appropriate in the premises.

Devex Corporation
William C. McCoy, and
Theodore A. TeGrotenhuis,
By /s/ Frank H. Marks
Frank Marks
Lederer, Livingston, Kahn & Adsit,
120 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Plaintiffs.

/s/ William C. McCoy,
William C. McCoy

/s/ T. A. TeGrotenhuis,
T. A. TeGrotenhuis,
524 Bulkley Building,
Cleveland 15, Ohio.
Of Counsel for Plaintiffs

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5771

DEVEX CORPORATION, TECHNOGRAPH, INC., WILLIAM C. McCOY, THEODORE A. TE GROTENHUIS, FREDERICK B. ZIESENHEIM, MARJORIE TE GROTENHUIS, WILLIAM C. McCOY, JR., and KATHERINE M. BASSETT,

Appellants

v.

GENERAL MOTORS CORPORATION

Appeal from the United States District Court
for the District of Delaware

(D.C. Civil No. 3058)

District Judge: Honorable Caleb M. Wright

Submitted Pursuant To Third Circuit Rule 12(6)
June 25, 1987

Before: GIBBONS, *Chief Judge*, WEIS, *Circuit Judge*, and POLLAK,* *District Judge*.

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* The Honorable Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix J

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered June 27, 1986 be and the same is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/s/ Weis
Circuit Judge

Attest:

/s/ Sally Mrvos
Clerk

Date: Jun. 29, 1987